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SUSAN E. CAVEY, Appellant)	
)	
and)	Docket No. 04-1608
)	Issued: January 7, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Nashville, TN, Employer)	
)	

Case Submitted on the Record

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

On June 7, 2004 appellant filed a timely appeal of the May 11, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration, and the Office's October 17, 2003 merit decision, which denied her claim for a February 11, 2000 injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim and the nonmerit issue.

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a back condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On August 21, 2001 appellant, then a 42-year-old clerk, filed a traumatic injury claim alleging that on February 11, 2000 she hurt her back when she picked up some letters to file

which had fallen on the floor. She additionally stated that she sat on a stool which had no back support. Appellant stopped work on February 11, 2000 and did not return. In support of her claim, appellant submitted medical evidence and documentation from an August 19, 1998 injury pertaining to a chronic plantar fasciitis condition.¹ The employing establishment indicated on the reverse side of the claim form that appellant was terminated on January 20, 2000.

In a letter dated November 28, 2001, the Office requested additional factual and medical information from appellant. In a December 3, 2001 letter, appellant advised that her last full day of work was February 11, 2000, that she was paid until March 17, 2000 and was terminated on May 31, 2000. She also advised that she was awaiting approval for disability retirement which she had filed for in September/October 1999. Appellant further stated that she saw her gynecologist on February 12 and 13, 2000 and underwent surgery on February 14, 2000. Copies of physical therapy reports, a February 24, 2000 report from Dr. Randy Fox, a Board-certified gynecologist, which noted that appellant was totally disabled from February 12 to 21, 2000 due to dysmenorrheal metrorrhagia and reports from Dr. Barrett F. Rosen, a Board-certified orthopedic surgeon, were submitted. In a February 22, 2000 report, Dr. Rosen noted that appellant had an onset of back pain after she had leaned over to do some filing around the seventh of the month and that she underwent gynecologic surgery on February 14, 2000. He further noted that appellant's gynecologist did not feel that appellant's conditions were an explanation for her pain. An impression of probable mechanical type syndrome was provided. In a July 16, 2001 report, Dr. Rosen advised that appellant's back pain began approximately one and a half years earlier. He opined that it was a mechanical-type pain with no significant pathologic findings. Dr. Rosen recommended that appellant continue her exercise program for both her feet and her back.

By decision dated December 28, 2001, the Office denied appellant's back claim as the evidence failed to establish a condition causally related to the February 11, 2000 work factors.

In a February 10, 2002 letter, appellant requested an oral hearing regarding the Office's December 28, 2001 decision. In a February 19, 2002 letter, which was faxed to the Office on April 25, 2002, appellant advised that she wanted to subpoena witnesses for her hearing. In a May 2, 2002 letter, the Office hearing representative denied appellant's subpoena request.

On May 21, 2002 the hearing took place during which time appellant testified. Appellant discussed her foot condition, for which the Office had approved disability on January 29, 2001. She also described several jobs she had performed, noting that her back pain dated back several years and that she had reported such pain to her supervisor as far back as July 27, 1997. Appellant additionally noted that she had problems with back pain associated with her menstrual cycle, but that Dr. Fox had determined that her back pain was not due to her female problems. In response to a question of whether her back condition was traumatic or occupational in nature, appellant described the February 11, 2000 incident and additionally stated that she felt the condition was occupational in nature due to repeatedly pushing, bending, stooping, etc. Appellant's neighbor, Terri Smith, testified as to the changes she witnessed in appellant. The employing establishment responded to appellant's testimony by letter dated June 28, 2002.

¹ The Board notes that this claim does not adjudicate appellant's foot condition. Claim No. 06-0710980 pertains to appellant's foot condition.

Appellant also provided comments from the hearing transcript and a response to the employing establishment's statements in a July 4, 2002 letter.

By decision dated July 26, 2002, the Office hearing representative affirmed the denial of appellant's claim finding that the medical evidence of record was insufficient to establish that she had a traumatic injury on February 11, 2000 or an occupational back condition causally related to her job duties.

In a January 21, 2003 letter, appellant requested reconsideration and reiterated that she was required to sit on a stool without any back support while working. She submitted nonmedical documentation related to leave and position assignments along with a January 4, 2003 letter from her parents. Medical documentation included an October 12, 1999 prescription slip from Dr. Rosen which stated that she was able to return to work "on same restrictions," and a December 3, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine. In a January 30, 1998 report, Dr. Rosen noted that appellant was symptomatic in her foot, referenced some back problems, and opined that she had some sort of inflammatory-type problem. In a December 5, 2000 report, Dr. Stanley G. Hopp, a Board-certified orthopedic surgeon specializing in the spine, noted that the results of the MRI scan were normal and diagnosed disc bulges on the left side and degenerative discs.

By decision dated April 16, 2003, the Office denied modification of its previous decision noting that the medical evidence failed to establish that the claimed condition was causally related to appellant's work factors.

In a July 17, 2003 letter, appellant requested reconsideration of the Office's April 16, 2003 decision. In a July 14, 2003 report, Dr. John J. Kruse, a neurologist, noted appellant's complaints of low back and right leg pain and her diagnoses pertaining to her feet. He diagnosed low back pain, noting that the MRI scan showed a disc bulge at L1-2 with some mild degeneration at lower lumbar levels. Dr. Kruse opined that the MRI scan findings and her symptoms were not congruent as there was no evidence that the sciatic nerve was involved.

By decision dated October 17, 2003, the Office denied modification of the prior decision.

In a February 18, 2004 letter, appellant requested reconsideration of the October 17, 2003 decision stating that she had back trouble on numerous occasions. She submitted documentation pertaining to the claim involving her foot, medicals unrelated to the current claim, copies of evidence previously of record, along with new evidence which comprised a March 1, 2000 physical therapy note, Dr. Rosen's May 12, 1999 progress report and Dr. Rosen's February 22, 2000 referral to physical therapy for low back syndrome.

By decision dated May 11, 2004, the Office denied appellant's request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.⁵

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury.⁶

ANALYSIS -- ISSUE 1

In the instant case, appellant has failed to meet her burden of proof that she sustained a new occupational injury or a traumatic injury on or about February 11, 2000 causally related to her work duties.

Appellant indicated on the August 21, 2001 claim form and in her May 21, 2002 hearing testimony that she experienced back pain while picking up some letters which had fallen to the floor during filing. She also identified the factors of employment, which she believed caused or

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Id.*

⁶ *Steven S. Saleh*, 55 ECAB ____ (Docket No. 03-2232, issued December 12, 2003).

aggravated the claimed occupational illness, namely: repeated pushing, bending and stooping. It is not disputed that appellant performed these duties. However, the medical evidence is insufficient to establish that any particular employment factors or incidents caused or aggravated a back condition. Medical reports submitted by appellant either relate to her foot claim, which is not before the Board, or fail to attribute her back pain on or about February 11, 2000 to the implicated work duties. Although Dr. Kruse diagnosed low back pain and discussed the findings on the MRI scan, he provided no opinion on the cause of appellant's back pain. Dr. Hopp diagnosed disc bulges and degenerative discs; however, he failed to provide an opinion on the relationship between the diagnosed condition and any factors or incidents of appellant's employment. Although Dr. Rosen noted in his July 16, 2001 report that appellant's onset of back pain began on the seventh of the month after she leaned over doing some filing, he failed to provide any opinion on the causal relationship of appellant's back condition, either traumatic or occupational in nature. Additionally, Dr. Rosen failed to prove a definite diagnosis for the back condition. Thus, none of the medical reports of record show that the work-related duties implicated by appellant would have caused or aggravated an injury, either occupational or traumatic in nature.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS -- ISSUE 2

Appellant's February 18, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁹

With respect to the third requirement, providing relevant and pertinent new evidence not previously considered by the Office, appellant submitted medical evidence which was previously of record or which predated the date of injury of this claim. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

⁹ 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

constitute a basis for reopening the case.¹⁰ Additionally, the “new” medical evidence appellant submitted comprised of Dr. Rosen’s May 12, 1999 progress report and Dr. Rosen’s February 22, 2000 referral to physical therapy for low back syndrome, are not relevant as the reports fail to address whether appellant’s back condition is causally related to her federal employment.

Inasmuch as appellant did not submit any “relevant and pertinent new evidence,” she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).¹¹

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that her back condition was caused or aggravated in the performance of duty. The Board also finds that the Office properly declined to reopen appellant’s claim for consideration of the merits on May 11, 2004.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2004 and October 17, 2003 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: January 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹¹ 20 C.F.R. § 10.608(b)(2)(iii).